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82-1148

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN A. QUEEN AND QUEEN ELECTRIC MANUFACTURING COMPANY, *Petitioners*

v.

TENNESSEE VALLEY AUTHORITY, MIKE BUTLER AND CRAVEN CROWELL, *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Are the Tennessee Valley Authority and its employees immune from civil liability for defamatory statements made in the exercise of its proprietary functions rather than governmental functions?

2. Are Petitioners entitled to a judicial declaration that the statements are defamatory and to injunctive relief to prevent further publication of the defamatory statements if the TVA and its officials are immune from civil liability?

LIST OF PARTIES TO THE PROCEEDING BELOW

The caption of the case in this Court contains all parties named in the proceedings below, namely, JOHN A. QUEEN, QUEEN ELECTRIC MANUFACTURING COMPANY, TENNESSEE VALLEY AUTHORITY, MIKE BUTLER, and CRAVEN CROWELL.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS DELIVERED IN COURTS BELOW 1

GROUNDS FOR JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. SUMMARY 2

B. PARTIES 2

C. THE DISTRICT COURT'S DECISION 4

D. THE SIXTH CIRCUIT'S DECISION 4

REASONS FOR GRANTING THE WRIT 6

A. THE TENNESSEE VALLEY AUTHORITY AND ITS EMPLOYEES BY CONGRESSIONAL MANDATE DO NOT ENJOY SOVEREIGN IMMUNITY IN DISCHARGING THE PROPRIETARY FUNCTIONS OF THE TVA 6

B. DECLARATORY AND INJUNCTIVE RELIEF AGAINST FURTHER PUBLICATION OF DEFAMATORY STATEMENTS IS PROPER WHEN THERE IS SOVEREIGN IMMUNITY FROM THE PAYMENT OF CIVIL DAMAGES 11

CONCLUSION 13

CERTIFICATE OF SERVICE 14

TABLE OF CONTENTS

Page

APPENDIX:

A. Opinion of the United States District Court for the Eastern District of Tennessee, Northern Division..... A-1

B. Opinion of the United States Court of Appeals for the Sixth Circuit A-13

C. 16 U.S.C. §831 and §831i..... A-29

TABLE OF AUTHORITIES

Cases: Page

Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) 11

Butz v. Economou, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895, 915-916 (1978) 9, 12

F.H.A. v. Burr, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940) 5, 8

Grant v. Tennessee Valley Authority, U.S.D.C., E.D. Tenn., 49 F.Supp. 564, 566 (1942) 7

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 644, 95 L.Ed. 817, 837 (1951) 12

Latch v. Tennessee Valley Authority, U.S.D.C, N.D. Miss., 312 F.Supp. 1069, 1072 (1970) 8

Nixon v. Fitzgerald, -U.S.-, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) 10

Statutes:

16 U.S.C. §831 1

16 U.S.C. §831c 1

16 U.S.C. §831c(b) 6

16 U.S.C. §831i 11

28 U.S.C. §1254(1) 1

28 U.S.C. §2680(l) 2, 10

Other Authorities:

H.R. Rep. No. 48, 73d Cong., 1st Sess. 16 (1933) 7

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division, is reported at 508 F.Supp. 532 (E.D. Tenn. 1980) and is attached to this petition as Appendix A. The opinion of the United States Court of Appeals for the Sixth Circuit, attached as Appendix B, is reported at 689 F.2d 80 (6th Cir., 1982).

GROUNDS FOR JURISDICTION

The judgment of the Sixth Circuit was entered on September 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

A. The Tennessee Valley Authority Act of 1933 creating the Tennessee Valley Authority provides in part as follows:

> "Except as otherwise specifically provided in this chapter, the Corporation—
>
> . . .
>
> (b) May sue and be sued in its corporate name." 16 U.S.C. §831c.

The purpose clause of the Act is 16 U.S.C. §831 and is found in Appendix C.

B. The Federal Tort Claims Act provides in part as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> . . .

(1) Any claims arising from the activities of the Tennessee Valley Authority." 28 U.S.C. §2680(l).

STATEMENT OF THE CASE

A. SUMMARY

On August 12, 1980 John A. Queen and Queen Electric Manufacturing Company filed their Complaint in the United States District Court for the Eastern District of Tennessee, Northern Division, against the Tennessee Valley Authority (TVA), Mike Butler and Craven Crowell asserting a common law action for defamation. The Complaint prayed for compensatory and punitive damages resulting from the defamation totaling $2,000,000.00. Alternatively, a judicial declaration was sought that the statements were defamatory and for injunctive relief to prevent further publication of said statements in the event that it was determined that the TVA and its employees were entitled to the protection of sovereign immunity.

The District Court granted a summary judgment holding that the Defendants were immune from prosecution of civil damages for defamatory statements and refused to issue an injunction without addressing the defamation issue. The Sixth Circuit affirmed the judgment of the District Court with one judge dissenting.

B. PARTIES

John A. Queen and Queen Electric Manufacturing Company developed, manufactured and distributed primarily on a wholesale basis an energy savings product known as the "Phase Liner." Queen Electric has sold on

its own and through numerous independent distributors more than 6,000 of these units to various residential, commercial and industrial customers and guaranteed to these customers that their electric bill would be reduced under certain circumstances.

Mike Butler, Manager of Media Relations, Craven Crowell, Director of Information, and other employees of TVA are alleged to have knowingly made false and defamatory statements that Queen Electric and John Queen had filed and lost a $5,000,000.00 lawsuit against the TVA; that they were prohibited from advertising the Phase Liner as an energy savings device in Colorado; and that the Phase Liner was not a genuine energy conservation device which would result in any benefit to residential or commercial users. Queen alleged that as a result of these defamatory statements he had been greatly damaged in his name, reputation and credit and had suffered much humiliation, embarrassment, mental pain and anguish. Queen Electric alleged that it had suffered a loss of profits in expanding its distributorships and in selling its Phase Liner units. Compensatory and punitive damages of $2,000,000.00 were sought by the Plaintiffs.

Affidavits of Mike Butler and Craven Crowell filed by them in support of the Motion for Summary Judgment admitted that the alleged defamatory statements about the Phase Liner had been made and their statement that Queen and Queen Electric had lost a $5,000,000.00 defamation lawsuit against TVA was false.

C. THE DISTRICT COURT'S DECISION

The District Court held that the employees were entitled to absolute immunity from civil liability because they were acting within the scope of their duties. 508 F.Supp. 535. Based on this holding, the Court held that under Tennessee law the TVA was not vicariously liable because its agents were not liable. 508 F.Supp. 535. The Court also declared that as a matter of federal law the TVA was also entitled to absolute immunity the same as its employees. 508 F.Supp. 536.

Declaratory and injunctive relief were denied on the basis that the First Amendment authorized the TVA to comment on matters of public interest and the debate over the merits of the Phase Liner was of public interest. 508 F.Supp. 536. In denying the declaratory and injunctive relief, the Court considered it of no consequence that the Defendants were immune from civil liability. 508 F.Supp. 536. Previous to its ruling on the Motion for Summary Judgment, the District Court had denied a temporary injunction on the basis that there was an adequate remedy at law.

D. THE SIXTH CIRCUIT'S DECISION

The Sixth Circuit affirmed the judgment of the District Court. 689 F.2d 81. The Court held as the District Court had that the TVA employees were entitled to absolute immunity from suit in their personal capacity for statements made in the course of the performance of their duties. 689 F.2d 84. It was noted by the Court that the doctrine of absolute immunity has been criticized by

very reputable authorities and does cut off meritorious claims. 689 F.2d 84.

Concerning the liability of the TVA, the Court's opinion pointed out specifically that it is very clear that the TVA does not enjoy sovereign immunity because of the language selected by Congress in the enabling act. 689 F.2d 85. The legislative history of the Act was traced showing that the House bill which contained the final language on liability "placed no limitations whatever upon the suability of the corporation, so that all persons who had a cause of action against the corporation might have their day in Court." 689 F.2d 85. The Court's opinion also mentioned that the Supreme Court had stated in *F.H.A. v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940) that the "sue and be sued" clauses of the Act should be construed broadly. 689 F.2d 85. Yet, in spite of the congressional mandate and the admonition of this honorable Court, the Sixth Circuit granted immunity to the TVA because the actions taken by the employees were pursuant to authorized statutory activities. 689 F.2d 86.

In affirming the District Court's decision not to issue an injunction against defamatory statements, the Sixth Circuit held that there was no showing that the lower court abused its discretion in refusing to issue the injunction. 689 F.2d 86. The Court reasoned that an injunction was not appropriate to resolve a dispute that is "best resolved by the expression, and not the suppression of information and ideas." 689 F.2d 86.

REASONS FOR GRANTING THE WRIT

The effect of the Sixth Circuit's decision gives the TVA and its employees acting within the course and scope of their duties absolute immunity from prosecution for civil damages for their torts contrary to the clear expression of the Congress as set forth in the Act creating the TVA; denies the right to have a judicial determination that statements made by the TVA and its employees are defamatory; and denies any judicial relief from further publication of judicially determined defamatory statements. Thus, this federal corporation and its employees are liable only for ultra vires acts and enjoy a more favored position than the federal government itself because of the liability imposed on the federal government through the Federal Tort Claims Act.

A. THE TENNESSEE VALLEY AUTHORITY AND ITS EMPLOYEES BY CONGRESSIONAL MANDATE DO NOT ENJOY SOVEREIGN IMMUNITY IN DISCHARGING THE PROPRIETARY FUNCTIONS OF THE TVA.

In creating the Tennessee Valley Authority, the Congress made itself very clear in the enabling act that the TVA was not to enjoy sovereign immunity. 16 U.S.C. §831c(b). The legislative history of the Act reveals the intent of the Congress in authorizing the TVA to "sue and be sued in its corporate name."

> "The Senate amendment limited the suability of the corporation solely to suits for the enforcement of contracts and the defense of property. The House bill placed no limitations whatever upon the suability of the corporation, so that all persons who had a

> cause of action against the corporation might have their day in court. The House provision was written into the conference amendment in the interest of justice." H.R. Rep. No. 48, 73d Cong., 1st Sess. 16 (1933).

For almost forty (40) years, the federal courts have held TVA to be responsible in damages for wrongs committed within the commercial field of its activities. *Grant v. Tennessee Valley Authority*, U.S.D.C., E.D., Tenn., 49 F. Supp. 564, 566 (1942). In the *Grant* case, the court noted that TVA was created for the primary purposes "of promoting navigation and controlling floods." 49 F.Supp. 564. While these governmental activities of TVA do enjoy absolute immunity, its activities in the commercial area do not:

> "*But the functions of the Defendant [TVA] in the commercial field are entirely different.* Upon principle and authority, it is quite clear that government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens. It is my judgment that *Congress intended that the Defendant can be sued for all wrongs committed for conduct pertaining to its generating, use and sale of electric energy* made from the power created by its dams."[1] 49 F.Supp. 566.

This honorable Court in construing "sue and be sued" clauses in congressional legislation creating federal agencies and corporations has written:

> "Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it

[1]Emphasis ours throughout, unless otherwise noted.

> to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *FHA v. Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1940).

The federal courts and the courts of the various states have long noted that sovereign immunity does not apply to the government when it acts in a proprietary capacity. With respect to the TVA, the federal courts have declared it to be liable when it acts improperly in its proprietary capacity. *Latch v. Tennessee Valley Authority*, U.S.D.C., N.D. Miss., 312 F.Supp. 1069, 1072 (1970). The *Latch* opinion contains an excellent and accurate discussion of the scope of the liability of the TVA and the reasons for that liability. For the convenience of the Court, the pertinent portion of the opinion is set forth as follows:

> "*Clearly §831c(b) relinquished any sovereign immunity which TVA might have had as a government agency or corporation for proprietary functions by rendering it liable to direct lawsuit like any other litigant.* Such being the case, TVA was, before the enactment of the Federal Tort Claims Act, liable for its torts as to nongovernmental acts relating to the distribution and sale of electric power. . . . Without the benefit of Committee reports with

respect to the exceptions contained in §2680, it would appear to this court that TVA had a recognized 'common law' liability for tort in the exercise of its several proprietary functions and that Congress was quite unwilling to subject TVA to tort liability for its far ranging governmental activities in the fields of national defense, navigation and flood control, as coverage under the Federal Tort Claims Act would have done. It is to be noted that the complaint in the case deals with TVA's activities in the distribution and sale of electric power, and, therefore, would involve a determination of tort liability, quite apart from the scope of the Federal Tort Claims Act, including its exceptions." 312 F.Supp. 1072.

The statements made by the TVA employees that Queen Electric and John Queen had filed and lost a $5,000,000.00 lawsuit against the TVA; that they were prohibited from advertising the Phase Liner as an energy savings device in Colorado; and that the Phase Liner is of no benefit to residential or commercial users are not statements made pursuant to the discharge of duties of TVA's governmental functions of national defense, flood control or navigation. These statements were all made in connection with duties being discharged in the area of commerce.

This Court has consistently held that no man is above the law and that those in government from the highest to the lowest are obligated to obey it. *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895, 915-916 (1978). The reasons for sovereign immunity in carrying out governmental functions have not and should not be extended to governmental officials acting in proprietary capacities. In the latter situation those individuals

should be held accountable for their torts the same as nongovernmental officials acting in the same arena. There is no sound public policy reason to disregard the clear mandate of the Congress in authorizing the TVA to be sued for its torts.

Judge Merritt is absolutely correct in the dissenting opinion filed in this cause in declaring:

> "The old doctrine of absolute immunity should be declared dead except in the case of a few officials for whom there are impelling constitutional or policy reasons for such an immunity." 689 F.2d 87.

The recent decision of this honorable Court in *Nixon v. Fitzgerald*, -U.S.-, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), clearly indicates the Court is moving in the direction of restricting immunity from prosecution as opposed to expanding the coverage of immunity. Had the Congress desired the TVA to enjoy absolute immunity it would not have placed an authorization for suing the corporation in the enabling act. The Congress reaffirmed its intention for the TVA to be sued under the enabling act by expressly excluding the TVA from the Federal Tort Claims Act. 28 U.S.C. §2680(l).

In seeking to justify its decision, the Sixth Circuit stated that the actions of the TVA which gave rise to the lawsuit were taken pursuant to a legislative mandate to "make studies, experiments and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries." 689 F.2d 86. However, an examination of the entire section of the Act from which the Court quoted reveals that these studies, experiments and determina-

tions are to be made in connection with the sale of surplus electric power and not in connection with energy saving devices being sold in the commercial arena. This is seen clearly from the first sentence of §831i, to wit:

> "The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, Counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth . . ."

All of §831i is reproduced in Appendix C. In any event, the important point to note is that the defamatory statements were made in connection with proprietary functions and not governmental ones. Accordingly, the rule of law announced by this Court in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959) is inapplicable to this case. In *Barr* and the other immunity cases, the individuals that were sued were engaged in governmental functions. In the cause at bar, the issue relates to a federal corporation that has both governmental and proprietary powers. Individuals' rights are severely threatened if this Court permits the decisions below to stand permitting governmental officials to commit torts while carrying out duties of a nongovernmental nature.

B. DECLARATORY AND INJUNCTIVE RELIEF AGAINST FURTHER PUBLICATION OF DEFAMATORY STATEMENTS IS PROPER WHEN THERE IS SOVEREIGN IMMUNITY FROM THE PAYMENT OF CIVIL DAMAGES.

As a general rule, injunctive relief is an inappropriate remedy in a common law defamation action. Usually de-

claratory relief is useless to a person who has already been injured. *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 57 L.Ed.2d 895, 915 (1978). However, declaratory and injunctive relief have been held by this Court to be appropriate remedies where there is immunity from damages for libel or slander. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 644, 95 L.Ed. 817, 837 (1951). While an individual may not be able to recover monetary damages for defamatory statements made about him, a judicial declaration that the statements are defamatory is exceedingly valuable. The defamed individual can publish this judicial declaration among those who have been exposed to the defamatory statements and, thus, counteract or stop the harm that has been done either in whole or in part. Similarly, an injunction against further publication of judicially determined defamatory statements is of great value to the defamed individual and will stop further harm to that individual.

The decision of the Sixth Circuit deprives Queen and Queen Electric of these very valuable rights.

The First Amendment has never been held by any court to authorize or protect defamatory statements. It can never be in the public interest to permit further publication of judicially determined defamatory statements. Accordingly, Queen and Queen Electric are entitled to a judicial determination of whether or not the alleged statements are defamatory and if they are found to be such, then to an injunction against their further publication.

CONCLUSION

The Sixth Circuit should never have affirmed the granting of the Summary Judgment by the District Court. The Tennessee Valley Authority Act of 1933 unquestionably denies absolute immunity to the TVA and its employees acting in pursuit of the proprietary functions of the TVA and renders the TVA and those employees liable for civil damages as a result of the commission of common law torts. Alternatively, Queen and Queen Electric are entitled to a judicial declaration of whether or not the statements are defamatory and if found to be defamatory, then to an injunction of further publication of those statements.

WHEREFORE, PREMISES CONSIDERED, John A. Queen and Queen Electric Manufacturing Company respectfully request this honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the decision of this cause.

Respectfully submitted,

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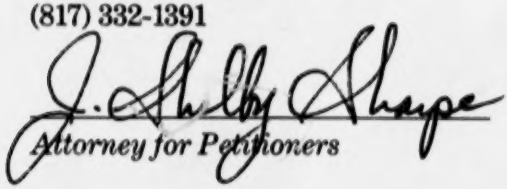
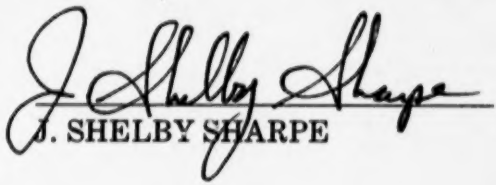


Attorney for Petitioners

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari has been deposited in the United States Post Office, first class mail, prepaid, addressed to all counsel of record at their post office addresses this 22nd day of December, 1982.



J. SHELBY SHARPE

APPENDIX A

[FILED DEC. 11, 1980, KARL D. SAULPAN, JR., Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIV. 3-80-359

JOHN A. QUEEN and QUEEN ELECTRIC MANUFACTURING COMPANY
v.
TENNESSEE VALLEY AUTHORITY, ET AL

MEMORANDUM

In this action plaintiffs seek damages and declaratory and injunctive relief for libel and slander against the Tennessee Valley Authority (TVA) and Mike Butler and Craven Crowell, both employees of TVA. Defendants have moved for summary judgment.

Plaintiffs manufacture and market a product called a Phase Liner. Plaintiffs claim that the Phase Liner will reduce electric bills of consumers significantly once installed. TVA claims that the Phase Liner will not reduce electric bills for residential and small commercial consumers of electricity within the area served by TVA. It is this claim by TVA that is the subject of this litigation.

During this controversy, various TVA employees expressed TVA's position regarding the Phase Liner. In September, 1978, at the request of television news reporters in Nashville, Tennessee, Walter J. Szelich appeared on two Nashville television stations. Both appearances followed broadcasts by the stations approximately one week earlier on which plaintiff Queen appeared and demonstrated the Phase Liner. Szelich discussed the function of the Phase Liner and stated that it would not reduce the electric bills of residential or small commercial consumers of electricity. Later he prepared a "Report on the Capability of the Phase Liner Device to Reduce Electric Bills in the TVA Service Area." That report sets out TVA's position on the Phase Liner and explains Szelich's laboratory tests of the device. (Ex. 4 to Affidavit of Walter J. Szelich, Jr.) In July and August, 1980, Szelich stated TVA's position on the Phase Liner to the Clarksville Department of Electricity at its request. (Szelich Affidavit).

In June and July, 1980, R. J. Thompson responded to an inquiry from Bob Sherborne of *The Tennessean* regarding the Phase Liner and explained TVA's position. Thompson also accompanied Szelich on July 31, 1980 to explain TVA's position in response to the inquiry from the Clarksville Department of Electricity. (Affidavit of R. J. Thompson).

On or about July 24, 1980, Louis M. Gwin, Jr. and Clark Reid, an editor under Gwin, prepared a press release entitled "'Black Boxes' Not Key to Energy Con-

servation." Mike Butler was listed as contact spokesperson on the release. (Affidavit of Louis M. Gwin, Jr.)[1]

These statements of TVA's position by TVA employees form the basis of this action. In addition, defendant Crowell made an allegedly defamatory statement in response to an inquiry from Jack Seamonds, an Associated Press Reporter. According to Seamonds,

> Mr. Crowell informed me that the owner of Queen Electric Manufacturing Company, John Queen, had appeared on a television program with an electrical engineer for the TVA. During the television talk show, the engineer disputed Queen's claims that the Phase Liner saves energy. Subsequent to the television program Mr. Crowell said Queen filed a libel action against TVA charging that the TVA engineer who appeared with him on television had libeled his company and his product. Mr. Crowell told me the libel suit which asked for damages of $5 million had been dismissed with prejudice by the Federal Court in Knoxville. Mr. Crowell told me the judge who dismissed the suit had ruled that TVA by its nature had the right to comment on a device that was purported to save electricity.
>
> (Seamonds Deposition Upon Written Interrogatories, Answer to Interrogatory 18.)

From this information, Seamonds prepared the following news story:

> In mid-1979, the Tennessee Valley Authority — the world's largest producer of electric energy — questioned the validity of Phase Liner claims. The inven-

[1]Plaintiffs also rely on a letter written by S. David Freeman. In a memorandum and order filed in this case on December 3, 1980, the Court ruled that the letter could not be the subject of a libel action.

> tor and manufacturer, James Queen and Queen Electric Company of Fort Worth, Texas, filed and lost a $5 million libel suit in Federal Court. TVA spokesman, Craven Crowell, said the Judge dismissed the complaint with prejudice because the twelve state utility has the right to comment on matters affecting electric production.
>
> (Seamonds Deposition Upon Written Interrogatories, Answers to Interrogatories 16, 17 and 18).

In fact, the plaintiff in the litigation referred to above was Phase Liner Energy Savings Corporation, a distributor and franchising agent for plaintiff Queen's company. (Affidavit of Robert C. Glinski). Queen's deposition was taken in connection with the lawsuit, but he states in his affidavit that he did not control or direct the lawsuit. (Affidavit of John A. Queen).

Clearly, there are some disputed facts in this case, most notably whether or not the Phase Liner will reduce the electric bills for residential consumers or small commercial users. However, it is equally clear that there is no genuine issue as to any material fact with respect to the immunity of the TVA employees in this case. An allegedly defamatory statement by a federal official who has discretionary responsibility, made within the scope of his duties, does not subject the official to civil liability. *Barr v. Matteo*, 360 U.S. 564 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896); *Granger v. Marek*, 583 F.2d 781 (6th Cir. 1978). This Court's recent decision in *Walters v. Tennessee Valley Authority*, __ F.Supp. __, Civ. 3-80-367 (Nov. 11, 1980), *notice of appeal filed* (Nov. 19, 1980), is on point. In *Walters*, the plaintiff sought damages from

TVA and three employees because of an allegedly libelous statement released by TVA. The statement referred to plaintiff's job performance in TVA's Home Insulation Program. The defendant TVA employees held the positions of District Manager of the Eastern District Office of TVA's Office of Power; Manager of Media Relations; and Coordinator of the District Offices of TVA's Office of Power. This Court held that:

> Since all acts performed and statements made which form the basis of this lawsuit were done by officials of TVA and were "within the outer perimeter of their lines of duty," each of the individual defendants is absolutely immune from tort liability arising therefrom.

The same must be said in this case. Each of the TVA employees who was involved in making the statements at issue has submitted an affidavit and job description. Plaintiffs have offered no evidence to the contrary.

Defendant Michael Butler was Manager of Media Relations when the press release entitled "'Black Boxes' Not Key to Energy Conservation" was released. In this position he was responsible for maintaining "daily contact with the news media in the Tennessee Valley and beyond and serve[d] as key public spokesperson for the agency on matters related to TVA." (Ex. 1 to Affidavit of Michael L. Butler). Defendant Craven Crowell was Director of Information for TVA when he committed his allegedly libelous acts. As such, he served as head of TVA's Information Office. The Information Office "investigates and responds to expressions of public concern about any TVA program" and "issues or approves issuance of news releases" and "serves as point of contact

with the press." (Exs. 1-3 to Affidavit of Craven Crowell, Jr.). Louis Gwin was Assistant Director of Information. He was "responsible for managing all TVA contact with the press" and supervising "the Broadcast Media Staff, field information representatives, and the Information Office spokesman." (Ex. 1 to Affidavit of Louis M. Gwin, Jr.) Clearly, these individuals had the authority to make the statements at issue here.

Walter Szelich and R. J. Thompson are registered professional engineers. From February 24, 1980, until October 19, 1980, Szelich was supervisor of the commercial and industrial section of TVA's Kentucky District Office. Prior to that time he was an electrical demonstration representative in TVA's Central District Office in Nashville. (Affidavit of Walter J. Szelich, Jr.) Thompson was electrical demonstration representative with TVA, and served as unit supervisor of the commercial section in the Central District Office of TVA's Office of Power, located in Nashville, Tennessee. (Affidavit of R. J. Thompson). The job description of an electrical demonstration representative states that he:

> Presents talks and slide programs on conservation and efficient use of electricity in commercial and industrial applications and on TVA's power program to consumer groups, professional groups, civic clubs, power distributor personnel and others. . . . Advises power distributors regarding methods and procedures for solving local commercial and industrial power problems.
>
> (Ex. 2 to Affidavit of Walter J. Szelich;
> Ex. 1 to Affidavit of R. J. Thompson).

As supervisor of the commercial and industrial section of a TVA District Office, Szelich had responsibilities which

included "developing, conducting and implementing with power distributors and ultimate consumers various Valley-wide energy demonstration and research programs on conservation and efficient use of electricity in commercial and industrial applications. . . ." (Ex. 3 to Affidavit of Walter J. Szelich, Jr.) It is thus clear that the statements of TVA's position by Szelich and Thompson were within the scope of their duties. Because the federal employees involved in this case were acting within the scope of their official duties, we hold that each of the individual defendants is absolutely immune from civil liability.

Tennessee law does not impose vicarious liability when the agent is not subject to individual liability. *Walters, supra; Stewart v. Craig*, 208 Tenn. 212, 344 S.W.2d 761 (1961). As a matter of federal law, TVA may assert the defense of absolute immunity just as its employees may. *Becker v. Philco Corp.*, 372 F.2d 771 (4th Cir. 1967), *cert. denied*, 389 U.S. 979 (1967); *Adams v. Home Owners' Loan Corp.*, 107 F.2d 139 (8th Cir. 1939). Accordingly, we also hold that TVA cannot be held liable for damages in this case.

Plaintiffs also seek declaratory and injunctive relief to prevent TVA from expressing its opinion on the merits of the Phase Liner.

It must be recognized that TVA enjoys the full panoply of First Amendment protections for its direct comments on public issues. *See Consolidated Edison Co. v. Public Service Commission*, __ U.S. __, 48 U.S.L.W. 4776 (1980). Also, we note the Supreme Court's recent statement that "energy conservation . . . is an imperative

national goal." *Central Hudson Gas & Electric Corp. v. Public Service Commission*, ___ U.S. ___, 48 U.S.L.W. 4783, 4787 (1980). The affidavits and depositions submitted to the Court show the public interest and debate which the Phase Liner has engendered. As noted earlier, Queen and Szelich have made television appearances to discuss the device and the news media has made inquiries. Also numerous advertisements promoting the Phase Liner as an energy conservation device, as well as other news stories, have appeared in newspapers and magazines in the TVA service area. TVA has been asked many times about the capabilities of the device. (Exs. 2 and 3 to Affidavit of R. J. Thompson). Plaintiffs have submitted numerous depositions as well as Queen's affidavit to support their claim that the Phase Liner will reduce the electric bills of any consumer. (Affidavit of John A. Queen; Howard Deposition; Burgbacher Deposition; Bright Deposition; Powell Deposition; O'Dowd Deposition; Hill Deposition). TVA, on the other hand, claims that their tests indicate that the device will not help residential or small commercial users of electricity. (Affidavit of Walter J. Szelich, Jr.). By seeking injunctive relief, plaintiffs now seek to exclude TVA from the debate over the merits of the Phase Liner.

The free discussion of matters of public interest is not properly enjoined. *Robinson v. American Broadcasting Cos.*, 441 F.2d 1396 (6th Cir. 1971); *American Broadcasting Cos. v. Smith Cabinet Mfg. Co.*, 160 Ind.App. 367, 312 N.E.2d 85 (1974); *Krebiozen Research Foundation v. Beacon Press, Inc.*, 344 Mass. 86, 134 N.E.2d 1 (1956); *cert.denied.* 352 U.S. 848 (1956). In *Robinson v. American Broadcasting Cos., supra*, the Court denied an

injunction which would have restrained the broadcasting of anti-smoke commercials. With regard to the plaintiff's defamation claim, the Court stated that

> the right of protection against defamation must give way to the public's right to open discussion and exchange of ideas.
>
> 441 F.2d at 1401.

We believe the same considerations apply to this case. Therefore, in view of the public interest in energy conservation and energy saving devices, we hold that plaintiffs' claim for declaratory and injunctive relief must be denied.

Plaintiffs argue that since defendants are immune from civil liability they are entitled to an injunction. They argue that a determination as the product's ability to reduce electric bills must now be made. Justice Holmes answered these arguments in his famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919), when he stated that

> the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .
>
> 250 U.S. at 630.

The debate over the abilities of plaintiffs' product is a technical one. Likewise, the debate over which energy conservation measures are the most effective is not capable of easy resolution. These issues are to be settled in the market place and not by this Court.

At oral argument counsel for TVA stated that TVA only gave its position on the Phase Liner in response to inquiries from its customers or the news media. In the opinion of the Court TVA had not only a right but also a duty to respond to these inquiries. The TVA Act directs the TVA Board

> to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region. . . .
>
> 16 U.S.C. § 831i.

TVA complied with this directive by stating its position on the merits of plaintiffs' product. Furthermore, we are not convinced that TVA's statements constitute defamation. Defendants' statements concerning plaintiffs' product do not tend "to blacken the reputation" of plaintiff or "to expose him to public hatred, contempt or ridicule;" nor do the statements "reflect in a defamatory manner upon the conduct, management, or financial condition of the corporation." *Electric Furnace Corp. v. Deering Milliken Research Corp.*, 325 F.2d 761, 764-65 (6th Cir. 1963). TVA's statements are simply its opinion on what energy conservation measures consumers should pursue. This should not be enjoined.

Plaintiffs have moved to strike the affidavits of Szelich, Thompson, Crowell and Glinski. The contentions made by plaintiffs have been considered by the Court

while ruling on defendants' motion for summary judgment. The Court has relied upon Exhibits 2 and 3 to the Affidavit of R. J. Thompson and finds plaintiffs' objections to these to be without merit. The Court has not relied upon the portions of the other affidavits which plaintiffs challenge. Accordingly, the affidavits will not be stricken.

For the reasons stated, it is ORDERED that plaintiffs' motion to strike affidavits be, and the same hereby is, denied. It is further ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that this case be, and the same hereby is, dismissed.

Order Accordingly.

/s/ Robert Taylor

United States District Judge

[DEC. 11, 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIV. 3-80-359

JOHN A. QUEEN and
QUEEN ELECTRIC MANUFACTURING COMPANY
v.
TENNESSEE VALLEY AUTHORITY, ET AL

ORDER

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that plaintiffs' motion to strike affidavits be, and the same hereby is, denied. It is further ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that this case be, and the same hereby is, dismissed.

Enter:

/s/ Robert Taylor
United States District Judge

APPENDIX B

No. 81-5018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN A. QUEEN and QUEEN ELECTRIC MANUFACTURING COMPANY,
Plaintiffs-Appellants
v.
TENNESSEE VALLEY AUTHORITY, MIKE BUTLER and CRAVEN CROWELL,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed September 24, 1982.

Before: LIVELY and MERRITT, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge, delivered the opinion of the court in which LIVELY, Circuit Judge, joined. MERRITT, Circuit Judge (pp. 13-14) delivered a dissenting opinion.

PHILLIPS, Senior Circuit Judge. This is an action for common law defamation against the Tennessee Valley Authority (TVA) and certain of its employees. The complaint was filed by appellants Queen Electric Company and its principal stockholder, John A. Queen (hereinafter referred to collectively as "Queen"). The litigation

involves statements made by TVA employees about a device manufactured by Queen Electric which is alleged to save electricity. The plaintiffs sought damages and injunctive relief.

District Judge Robert L. Taylor granted summary judgment in favor of defendants, holding that the TVA and its co-defendant employees are immune from suit in this type of action, and declined to issue an injunction. *Queen v. Tennessee Valley Authority*, 508 F.Supp. 532 (E.D. Tenn. 1980). Queen appeals. We affirm.

I

Plaintiff-appellant John Queen owns 88 per cent of the stock of Queen Electric Manufacturing Co. Queen invented and manufactures a device known as "Phase Liner" and has a patent application pending for this product. The purpose of the device is to reduce electric bills of consumers of electric power. The Phase Liner is advertised and promoted as being capable of reducing electric bills of commercial or residential users by as much as 30 per cent.

In September 1978, Mr. Queen appeared on a television news program in Nashville and demonstrated his product. A week later, the stations broadcasting the program invited a TVA representative to appear on the same show and discuss the device. Walter Szelich, a TVA engineer, appeared on the television program and expressed the opinion that the Phase Liner would not result in significant reductions in the electric bills of most of the TVA's residential and small commercial consumers. Since that appearance, the TVA has received

many requests for information about the Phase Liner as a conservation device. The TVA, adhering to the reasoning and conclusions of its engineers, has continued to maintain that the device would not serve to reduce the power bills of residential and small commercial consumers. A press release to that effect also was issued.

The dispute accelerated between TVA and Queen Electric and Queen's distributors in the Tennessee Valley Area. The differences of opinion between the parties became the subject of press releases, newspaper articles and various showdowns involving publicly staged experiments that were either unsuccessful or inconclusive.

A prior lawsuit alleging defamation was filed in a Tennessee State court by Phase-Liner Energy Savings Corporation, a distributor of the Phase Liner and a franchising agent for Queen. This action was transferred to the United States District Court for the Middle District of Tennessee, where it was dismissed with prejudice as to the claim for monetary damages and without prejudice as to the claim for injunctive relief. *Phase-Liner Energy Savings Corp. v. TVA*, No. 79-3346-NA-CV (M.D. Tenn. dismissed Jan. 23, 1980). Appellant Queen was not a party to that action, but appeared during the discovery proceedings as a deponent, as an expert witness, and as the manufacturer of the Phase Liner. A subsequent newspaper article, based on an interview with Craven Crowell, head of TVA's Information Office, contained the admittedly erroneous statement that Queen himself had filed and lost the $5,000,000 lawsuit in the district court for the Middle District of Tennessee.

The substance of the parties' factual dispute is not relevant to the disposition of this case and will not be delineated in great detail. Essentially, the position of the TVA is that the operative element of the Phase Liner, a "power factor correction capacitor," admittedly will reduce the electric bills of large industrial consumers, because these consumers are billed in part on their kilovoltampere demand ("kVA demand"). The Phase Liner's capacitor will reduce the kVA demand measurement and reduce the electric bill to the extent it is based thereon. Smaller commercial users and residential consumers, however, are not billed on the basis of kVA demand and TVA engineers express the view that the Phase Liner's reduction of this measurement will have no effect on their electric bills. The Phase Liner also reduces "line loss," which is basically the amount of power lost due to the resistance of the electrical line over which it travels. The TVA contends that the line loss for its smaller customers will be negligible, because it will be measured only over the relatively short distance between the customer's electric meter and the electrical load. The TVA's position on the Phase Liner is stated in its press release:

> TVA is concerned that if residential and small commercial consumers spend their available conservation funds on measures which do not reduce their electric bills, they will be unlikely to spend additional funds on proven and effective devices. Accordingly, TVA's conservation program includes advising the public about alleged conservation devices such as the Phase-Liner.

Appellant Queen disputes these conclusions of TVA and refers to experiments and demonstrations tending to

establish the efficacy of the device, and to the fact that only a very small proportion of the purchasers of the Phase Liner take advantage of the manufacturer's guarantee to return the full purchase price if the device does not reduce electric bills by at least 10 per cent.

Appellants filed this lawsuit on August 12, 1980. They contended that the TVA's statements about the Phase Liner and about Mr. Queen's having filed and lost the prior lawsuit were defamatory. They alleged substantial damage to Mr. Queen and to the business of Queen Electric, and sought $2,000,000 in damages and injunctive relief. Extensive discovery was undertaken by the parties. The defendants moved for summary judgment on November 25, 1980. District Judge Robert Taylor granted the motion of defendants on December 11, 1980. Judge Taylor found that the individual employees named as defendants were immune from suit under the doctrine of official immunity; that the TVA itself was immune on the basis of *respondeat superior;* and that an injunction would be contrary to the principles of the First Amendment. We affirm on the basis of the grounds set forth in this opinion. *Respondeat superior* is not the basis of our opinion.

II

The doctrine of official immunity has been created and developed by the federal courts. *See Howard v. Lyons*, 360 U.S. 593, 597 (1959). The rule was announced by the Supreme Court in *Barr v. Matteo*, 360 U.S. 564 (1959), wherein the Court held that federal executive officials enjoy absolute immunity from suit for common law torts based on acts within their discretionary authority. In

Granger v. Marek, 583 F.2d 781, 784-85 (6th Cir. 1978), this court followed the *Barr* rule and held that the rule as applied to common law torts survived the decision of the Supreme Court in *Butz v. Economou*, 438 U.S. 478 (1978), in which the Court held that federal officials were afforded only a qualified, good-faith immunity from suits for constitutional torts.

Judge Taylor held that the individual TVA employees named in the complaint were immune from suit under the *Barr* rule. 508 F.Supp. at 534. In making this determination, he relied on the decision of this court in *Granger v. Marek, supra*, 583 F.2d at 784-85, and his own prior decision in *Walters v. Tennessee Valley Authority*, 503 F.Supp. 111, 114-15 (E.D. Tenn. 1980), *aff'd in unpublished Order*, (6th Cir., Jan. 28, 1982) (No. 80-5430), *petition for cert. pending*, 51 U.S. L.W. 3025 (U.S., Apr. 23, 1982). (No. 81-1976).

The appellants do not argue that the individual employees were acting beyond the scope of their authority or that they were performing "ministerial" as opposed to "discretionary" functions. *See, e.g., Estate of Burks v. Ross*, 438 F.2d 230, 235 (6th Cir. 1971). Appellants argue instead that the TVA officials were performing proprietary rather than sovereign functions, because their actions arose out of TVA's role as a utility. While this factor may be relevant to the liability of the TVA itself for damages, the cases applying the *Barr* doctrine have not admitted of any such distinction in the immunity of an officer. *Compare, e.g., Estate of Burks, supra*, 438 F.2d at 232 (doctor who was also director and administrator of Veterans Administration hospital entitled to immunity); *Molevar v. Lindsey*, 411 F.2d 597 (6th Cir.

1969) (auditor for Federal Deposit Insurance Corporation entitled to immunity from suits for defamation arising out of statements made at the bank's meeting of the Board of Directors based on his audit); *see also Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 566 F.2d 289, 291-92 (D.C. Cir. 1977) (en banc) *cert. denied*, 438 U.S. 915 (1978) (Chairman of the Department of Anthropology at the Smithsonian Institution's Museum of Natural History immune from defamation suit for statements criticizing plaintiff's capabilities in the field of archaeological excavation, if statements made were within scope of his authority). There are stronger reasons for subjecting TVA officials to liability than any of the officials in the cases cited above, because TVA is more extensively involved in the commercial arena than most other Government agencies. *See* Wirtz, *The Legal Framework of the Tennessee Valley Authority*, 43 Tenn. L.Rev. 573 (1976). We nonetheless conclude that under the facts of the present case, the statements made by these officials are entitled to the protection of the *Barr* rule.

The TVA submitted affidavits describing the authority and responsibilities of its employees Craven Crowell and Michael Butler, who were sued individually by Queen. Crowell is head of TVA's Information Office and Butler was Manager of Media Relations (subordinate to Crowell) in the same Office. Crowell allegedly made the statement about Queen's role in the prior lawsuit to the news reporter, and Butler's name appeared on the press release describing TVA's position concerning appellant's device. According to the official job descriptions and the TVA organizational bulletin attached to the affidavits,

the Office of Information has the responsibility to investigate and respond to matters of expressed public concern and to provide information for public and official use on the "policies, decisions and accomplishments" of the TVA. The TVA asserts that these and other responsibilities of the Information Office are in furtherance of the statutory authority of TVA "to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries. . . . 16 U.S.C. §831i.

We conclude that the district court was correct in finding that these TVA officials were entitled to immunity from suit in their personal capacities for statements made in the course of the performance of these duties. We recognize that the doctrine of absolute immunity has been criticized by the commentators as causing, on occasion, the unnecessary foreclosure of meritorious claims. *See generally* Prosser, Law of Torts, §144, pp. 782-84, §132, pp. 987-92 (4th Ed. 1971); Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L.Rev. 1175 (1977); *Jaffe, Suits Against Governments and Officers; Damage Actions*, 77 Harv. L.Rev. 209 (1963); Comment, *Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of Barr v. Matteo*, 77 Colum. L.Rev. 625 (1977); *Recent Developments: Government Immunity*, 47 Tenn. L.Rev. 859 (1980) (criticizing the Sixth Circuit's decision in *Granger v. Marek, supra*, 583 F.2d 781). It also is true that what should be one of the most important considerations from a practical standpoint—whether the government agency has agreed to indemnify the official—has not played a significant role in the courts' analysis of this problem. *See*

K. C. Davis, Administrative Law Treatise Ch. 26 (1982 Supp.).

The rule in this Circuit has been settled by *Granger v. Marek, supra*, 583 F.2d 781, in which we determined that we are bound by the decision of the Supreme Court in *Barr v. Matteo. See* 583 F.2d at 784. The policies which favor the *Barr* rule are most appropriate in defamation actions of this type, where the defendants have a statutory directive to speak out on a matter of public concern, and where the public relies on these defendants as a source of information, and where the appellants seek to enjoin or impose liability on them for their good faith evaluation and criticism of their product.[1]

In *Walters, supra*, 503 F.Supp. at 115-16, Judge Taylor extended the application of the *Barr* rule to TVA officials and we affirmed in an unpublished decision. We reaffirm here that the *Barr* rule still applies in this Circuit and that the individual defendants in this case are entitled to its protection. We note, however, that a petition for certiorari is currently pending before the Supreme Court on this issue in the *Walters* case. *See* 51 U.S.L.W. at 3025, 3062. Any change in the law should await a decision by Congress or the Supreme Court.

[1]Appellants contend that Judge Taylor abused his discretion in denying appellants' motion to amend the complaint as untimely and meritless. We conclude that Judge Taylor did not abuse his discretion, and we note in addition that the amended complaint merely sought to add individual defendants, including TVA Chairman David Freeman, whose functions and responsibilities were similar to or more likely to receive the protection of this rule than those of the individual defendants discussed in this opinion, who were named in the first complaint.

III

Few courts have considered the relationship between officer immunity and the liability of the agency which employs the officer.

It is clear that under TVA's "sue and be sued" clause, 16 U.S.C. §831c(b), the TVA enjoys no sovereign immunity, and that Congress has provided expressly that the TVA may be sued. The TVA's enabling act provides that it "[m]ay sue and be sued in its corporate name." 16 U.S.C. §831c(b). The legislative history of the TVA Act, 16 U.S.C. §831 *et seq.*, indicates that this language was intended to be a broad waiver of sovereign immunity:

> The Senate amendment limited the suability of the corporation solely to suits for the enforcement of contracts and the defense of property. The House bill placed no limitations whatever upon the suability of the corporation, so that all persons who had a cause of action against the corporation might have their day in court. The House provision was written into the conference amendment in the interest of justice.

H. R. Rep. No. 48, 73d Cong., 1st Sess. 16 (1933).

The Supreme Court has also indicated that "sue and be sued" clauses should be construed broadly:

> Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not con-

> sistent with the statutory on constitutional scheme,[3] that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense.
>
> *F.H.A. v. Burr*, 309 U.S. 242, 245 (1940) (footnotes omitted).

This clause has been read to impose amenability to suit upon the TVA notwithstanding the Authority's protestations of immunity. *See, e.g., Smith v. Tennessee Valley Authority*, 436 F.Supp. 151, 152-54 (E.D. Tenn. 1977) (strict liability for blasting and continuing trespass for shock concussion waves); *Brewer v. Sheco Construction Co.*, 327 F.Supp. 1017, 1019 (W.D. Ky. 1971) (strict liability for blasting and detonating activities); *Adams v. Tennessee Valley Authority*, 254 F.Supp. 78, 80-81 (E.D. Tenn. 1966) (Taylor, J.) (wrongful acts of employees in blasting during construction of steam plant); *In Re Clerk's Fees and Cost Bonds*, 49 F.Supp. 1011 (M.D. Tenn. 1943) (TVA not exempt from paying filing fees in court).

Despite this broad consent to suit embodied in the TVA's enabling act, a number of courts have found that as a matter of "public policy" (and not immunity), the TVA cannot be subject to liability for damages when engaged in certain governmental functions. *See, e.g., Painter v. Tennessee Valley Authority*, 476 F.2d 943 (5th Cir. 1973) (TVA not liable for punitive damages where United States would not be); *United States v. Pressnell*, 328 F.2d 580 (6th Cir. 1964) (TVA not liable for costs in

eminent domain proceeding, because United States, real party in interest, would not be liable); *Lynn v. United States*, 110 F.2d 586, 590 (5th Cir. 1940) (TVA not liable for flood damage because "[t]he improvement of the river is not a tort which is unlawful, but an act which the United States had the right to do and commanded this agent to do"); *Sligh v. Tennessee Valley Authority*, 532 F.Supp. 168, 170-71 (E.D. Tenn. 1980) (TVA not liable for damage from flood control project); *Morris v. Tennessee Valley Authority*, 345 F.Supp. 321 (N.D. Ala. 1972) ("TVA's fluctuation of reservoir water levels in carrying out its water control functions as directed by statute represents an exercise of discretionary governmental authority which is not subject to judicial review"); *Pacific National Fire Insurance Co. v. Tennessee Valley Authority*, 89 F.Supp. 978, 979 (W.D. Va. 1950) (TVA not liable for blasting damage in connection with building a dam because construction of dam was a "discretionary governmental duty entrusted to TVA by statute") *Atchley v. Tennessee Valley Authority*, 69 F.Supp. 952, 954 (N.D. Ala. 1947) ("the Federal Government, its agencies and instrumentalities, are not liable for consequential damages arising out of the construction or operation of a navigation improvement. The doctrine for non-liability for consequential damages not amounting to a taking is not based upon the immunity to suit of the United States, but is a doctrine of substantive law which protects the agent as well as the principal"); *Grant v. Tennessee Valley Authority*, 49 F.Supp. 564 (E.D. Tenn. 1942) (TVA not liable in negligence for flood damage to plaintiff's crops because flood control is a governmental function).

These decisions demonstrate that in certain limited situations the TVA is exempt from liability arising out of the exercise of certain wholly governmental functions, where the TVA acts solely as the Government's agent and where the United States itself would not be liable. The nonliability is not an incident of immunity but the result of the entitlement of the TVA, when it acts solely as a governmental entity, to assert a well established substantive principle of nonliability which the Government itself would be entitled to assert and which the Government has not otherwise waived.

We conclude that the above rule applies to the statements complained of in this case. The actions taken in the present case were pursuant to a statutory mandate directing the TVA "to make studies, experiments and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries." 16 U.S.C. §831i. The public relies on the TVA as a Governmental source of information on energy conservation, and the TVA has undertaken to advise consumers about this matter of important public concern. What is expressly directed and authorized by a valid constitutional Act of Congress cannot be the subject of an action for damages. We find that the district judge correctly granted the motion of the defendants for summary judgment.

For the foregoing reasons, we also conclude that Judge Taylor did not abuse his discretion in refusing to issue the injunction against the defendants. We note that although appellants allege in their complaint malice, bad faith and an intent to harm their business, it is difficult to determine from appellant Queen's deposition testimony

where he disagrees with TVA's assessment of his product. Appellant indicated his agreement with almost every material conclusion made by TVA's engineer about appellants' device; these included the statements in the engineer's report that the Phase Liner reduces kVA demand and line loss, that most if not all of TVA's residential and small commercial consumers are not billed on the basis of kVA demand and that line loss in such cases usually will be negligible. Appellant Queen stated in this deposition that the Phase Liner ould save a residential consumer "very little." Appellant Queen's most substantial disagreements with the TVA involve hypothetical situations in which the Phase Liner is installed at the electrical load (rather than at the meter) and where the line over which the current flows is long enough to cause a substantial loss that would be ameliorated by the Phase Liner, or where the customers are metered on the basis of each individual electric load rather than on the basis of all the electric loads at the residence simultaneously. Appellants appear to object more to the dissemination rather than the content of the statements made by TVA about their product. Even absent TVA's statutory directive and the immunity of its officials, we conclude that the district court did not abuse its discretion in declining to issue an injunction in a dispute that is best resolved by the expression, and not the suppression of information and ideas.

The judgment of the district court is affirmed. The costs of this appeal are taxed against appellants.

MERRITT, Circuit Judge, dissenting. I respectfully disagree for the reasons stated in my dissenting opinion in *Granger v. Merek*, 583 F.2d 781, 786-87 (6th Cir. 1978). I do not believe that federal employees and agents are protected from all liability for either common law or statutory torts by the doctrine of absolute immunity. The recent case, *Nixon v. Fitzgerald*, __ U.S. __, 102 S.Ct. 2690 (1982), appears to overrule implicitly the doctrine of *Granger* holding that the qualified immunity announced in *Butz v. Economou*, 438 U.S. 478 (1978), applies only to constitutional torts. In the *Fitzgerald* case the Supreme Court held that the President's White House aides have only a good faith qualified immunity from liability for the violation of a federal statute. The old doctrine of absolute immunity should be declared dead except in the case of a few officials for whom there are impelling constitutional or policy reasons for such an immunity — members of Congress, judges and prosecutors and the President. This case therefore should be reversed and remanded to the District Court for application of a qualified good faith immunity to the conduct of the defendant federal officials.

Neither do I agree that TVA itself should be given an absolute immunity from liability for torts committed in its governmental capacity. Although TVA is not technically covered by the Federal Tort Claims Act, *see* 28 U.S.C. §2680(l), I would apply the Act by analogy. The Act represents the current legislative compromise on the subject of governmental liability, and I can see no reason in principle or policy why the accommodation reached in the Tort Claims Act should not apply to TVA. There is no indication that Congress intended an absolute immunity

for TVA. It is unclear what rules of liability Congress intended should apply to TVA. Here therefore we must create principles of liability and immunity under the federal common law. The Tort Claims Act provides the best place to turn for an analogue.[1]

Although the facts in the case before us suggest that the plaintiff would probably lose on the merits, the court disposes of the case in a way that forecloses the good case as well as the losing case. As a consequence of the rise of the administrative state during the past 50 years, business and citizens are often dependent in the first instance on federal administrative officials for the security of their property and their liberty. The federal courts provide the only effective avenue of redress for wrongs committed by these officials. Our doors should not be closed in cases of this type by doctrines of absolute immunity.

[1]In the instant case it would appear that the libel and slander exception to tort liability in the Act, *see* 28 U.S.C. §2680(h) would bar plaintiff's claims.

APPENDIX C

16 U.S.C. Section 831:

"For the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is created a body corporate by the name of the 'Tennessee Valley Authority' (hereinafter referred to as the 'Corporation'). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This chapter may be cited as the 'Tennessee Valley Authority Act of 1933.'"

16 U.S.C. Section 831i:

"The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts, for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: Provided, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision author-

izing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: Provided further, That the Board is authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the full and better balanced development of the resources of the region: Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: Provided further, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: And provided further, That the terms

'States,' 'counties,' and 'municipalities' as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction."

Office-Supreme Court, U.S.
FILED
MAR 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1148

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN A. QUEEN, ET AL., PETITIONERS
v.
TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
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QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioners' common law tort claims were barred by absolute immunity under *Barr* v. *Matteo*, 360 U.S. 564 (1959).

2. Whether the court of appeals correctly held that the district court acted within its discretion in refusing to enjoin respondents from answering inquiries about petitioners' product.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Atchley v. *TVA*, 69 F. Supp. 952 7

Barnes v. *Oody*, 514 F. Supp. 23 4

Barr v. *Matteo*, 360 U.S. 564 ..... 2-3, 4, 6

Butz v. *Economou*, 438 U.S. 478 6

Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 8

Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95 6

Federal Land Bank v. *Board of County Comm'rs*, 368 U.S. 146 6

Grant v. *TVA*, 44 F. Supp. 589 8

Grant v. *TVA*, 49 F. Supp. 564 7

Hardin v. *Kentucky Utilities Co.*, 390 U.S. 1 2

Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 6

Howard v. *Lyons*, 360 U.S. 593 4

Page

Cases—Continued:

Hoxsey Cancer Clinic v. *Folsom*, 155 F. Supp. 376 9

Jackson v. *TVA*, 413 F. Supp. 1050 7

Lewis v. *Reader's Digest Ass'n*, 366 F. Supp. 154 9

National Nutritional Foods Ass'n v. *Whelan*, 492 F. Supp. 374 9

Painter v. *TVA*, 476 F.2d 943 8

Pittman v. *Home Owners' Loan Corp.*, 308 U.S. 21 6

Steaks Unlimited, Inc. v. *Deaner*, 468 F. Supp. 779, aff'd, 623 F.2d 264 9

Stewart v. *Craig*, 208 Tenn. 212, 344 S.W.2d 761 7

Tennessee Electric Power Co. v. *TVA*, 306 U.S. 118 2

Trails West, Inc. v. *Wolff*, 298 N.E.2d 52 9

United States ex rel. TVA v. *Welch*, 327 U.S. 546 5

Walters v. *TVA*, 503 F. Supp. 111, aff'd, 698 F.2d 1225, cert. denied, No. 81-1976 (Oct. 4, 1982) 4, 6

Wheeldin v. *Wheeler*, 373 U.S. 647 7

Page

Statutes:

Tennessee Valley Authority Act, 16 U.S.C. (& Supp. V) 831-831dd 2
16 U.S.C. 831c(b) 7
16 U.S.C. 831c(g) 5
16 U.S.C. 831i 3, 4
16 U.S.C. 831m 5
16 U.S.C. 831n-4 5
16 U.S.C. (& Supp. V) 831n-4(h) 4
16 U.S.C. 831dd 5
Federal Tort Claims Act:
28 U.S.C. 2680(h) 8
28 U.S.C. 2680(*l*) 8

Miscellaneous:

H.R. Rep. No. 130, 73d Cong., 1st Sess. (1933) 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1148

JOHN A. QUEEN, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-13 to A-26) is reported at 689 F.2d 80. The opinion of the district court (Pet. App. A-1 to A-11) is reported at 508 F. Supp. 532.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1982. The petition for a writ of certiorari was filed on December 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners manufacture and market a device called the "Phase-Liner" through a system of distributors and dealers (Pet. App. A-14 to A-15). They claim that the Phase-Liner can substantially reduce the electric bills of residential and small commercial consumers of electricity supplied by the

Tennessee Valley Authority ("TVA") and have promoted the device by television and newspaper in the area where TVA power is sold (*ibid.*).[1]

Representatives of TVA have responded to inquiries from the public and the press about the Phase-Liner and have communicated the opinion of TVA engineers that the device will not reduce the electric bills of residential and small commercial consumers of TVA power (Pet. App. A-14 to A-15, A-16).[2] Differences of opinion between the parties became the subject of press releases, newspaper articles, and publicly staged experiments (*id.* at A-15). In 1979 a local distributor of the device filed a libel suit against TVA; that case was dismissed with prejudice as to the claim for monetary damages and without prejudice as to the claim for injunctive relief (*ibid.*). Petitioner John Queen was not a party to that action but appeared during the discovery proceedings as a deponent, as an expert witness, and as the manufacturer of the Phase-Liner (*ibid.*).

2. This suit was filed in the United States District Court for the Eastern District of Tennessee seeking damages, a declaratory judgment, and an injunction. Petitioners alleged that statements made by TVA employees about the Phase-Liner and about the prior lawsuit were defamatory (Pet. App. A-17). The district court held that petitioners' claim for damages was precluded by this Court's decision in *Barr*

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[1]TVA is a wholly owned government corporation, created by the Tennessee Valley Authority Act of 1933 ("TVA Act"), 16 U.S.C. (& Supp. V) 831-831dd, and declared by this Court to be "an instrumentality of the United States" (*Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 134 (1939)). Pursuant to the TVA Act, TVA supplies electricity in major parts of Tennessee and adjoining states. See *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 4 (1968).

[2]One of the documents that petitioners are seeking to enjoin from distribution is a report by a TVA engineer based upon his examination and testing of the device (C.A. App. 93).

v. *Matteo*, 360 U.S. 564 (1959), since the statements made by TVA's employees were privileged and TVA could not be held vicariously liable (Pet. App. A-4 to A-7). With respect to petitioners' request for a declaratory judgment and permanent injunction, the court held that the merits of this alleged energy conservation device were a matter of public interest and that it would not enjoin debate on such a matter (*id.* at A-7 to A-10).

The court of appeals affirmed, applying *Barr* v. *Matteo* to the damages claims against the TVA employees (Pet. App. A-17 to A-21) and holding that TVA could not be liable in damages for carrying out its statutory mandate (16 U.S.C. 831i) "to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries" (Pet. App. A-25). The court of appeals also held that the district court "did not abuse its discretion in declining to issue an injunction in a dispute that is best resolved by the expression, and not the suppression of information and ideas" (*id.* at A-26).[3]

Judge Merritt dissented. In his view, the doctrine of absolute immunity "should be declared dead except in the case of a few officials for whom there are impelling constitutional or policy reasons for such an immunity — members of Congress, judges and prosecutors and the President." Pet. App. A-27. With respect to TVA itself, Judge Merritt would likewise reject absolute immunity in favor of a federal common law of liability drawing on an analogy to the Federal Tort Claims Act; he acknowledged, however, that

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[3]The court of appeals also noted that in his deposition petitioner Queen appeared not to disagree with TVA's assessment of the Phase-Liner (Pet. App. A-25 to A-26). "[Petitioners] appear to object more to the dissemination rather than the content of the statements made by TVA about their product" (*id.* at A-26).

the FTCA expressly excludes TVA and that, even under that statute, the present case would be barred (*id.* at A-28 & n.1). Accordingly, Judge Merritt would have remanded the case although "[petitioners] would probably lose on the merits" (*id.* at A-28).

ARGUMENT

The court of appeals fully considered and correctly decided the issues before it. The court's decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, the case does not warrant further review.

1. Petitioners' common law damages claims, based upon alleged defamatory statements made by federal officials acting within their lines of duty, are precluded by this Court's decisions in *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Howard* v. *Lyons*, 360 U.S. 593 (1959). Where, as here, federal officials perform their professional responsibilities within the outer perimeter of their authority, they are immune from liability for damages based upon common law torts.[4]

TVA is authorized to generate and sell electric power as part of its regional resource development responsibilities. See, *e.g.*, 16 U.S.C. 831n-4(h). As an adjunct thereto, TVA has been granted broad powers to study and disseminate information about the proper use of electricity. As the court of appeals noted (Pet. App. A-25), the TVA Act, 16 U.S.C. 831i, "direct[s] the TVA 'to make studies, experiments and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for

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[4]This doctrine is applicable to TVA employees. *Walters* v. *TVA*, 503 F. Supp. 111 (E.D. Tenn. 1980), aff'd, 698 F.2d 1225 (6th Cir. 1982), cert. denied, No. 81-1976 (Oct. 4, 1982); *Barnes* v. *Oody*, 514 F. Supp. 23 (E.D. Tenn. 1981).

small or local industries,' " looking towards "the fuller and better balanced development of the resources of the region." The TVA Act also authorizes TVA to study and publicize "the practices, methods, facilities, equipment, [and] appliances" that are "best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy (16 U.S.C. 831m).[5]

In fulfilling its responsibility "to assure an ample supply of electric power" at "rates as low as are feasible" (16 U.S.C. (& Supp. V) 831n-4), TVA encourages conservation measures. Such measures reduce TVA's capital expenditures and thus benefit all the region's consumers. However, if residential and small commercial consumers expend funds on ineffective devices, fewer funds will be available for the purchase of proven and effective devices, such as electric heat pumps and insulation (Pet. App. A-16).

In light of these well-defined statutory responsibilities, there is no dispute that the TVA employees were acting within their statutorily prescribed duties.[6] Indeed, in their brief in the court of appeals (at 15), petitioners conceded that "[t]here has never been an issue raised in these proceedings on whether or not the employees of TVA were acting

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[5]In addition to these specified powers, the TVA Act grants TVA "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred" (16 U.S.C. 831c(g)). Petitioners' narrow reading of the Act is contrary to the command of 16 U.S.C. 831dd that the Act be "liberally construed." Cf. *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 552-554 (1946).

[6]Copies of the official job descriptions setting forth the duties of respondents Crowell and Butler and the other TVA employees who allegedly made defamatory statements were submitted to the district court (Pet. App. A-5 to A-7, A-19 to A-20; see C.A. App. 264-269, 289-292, 307-308, 312-313, 330-332). At the time of the events at issue, Crowell was TVA's Director of Information and Butler was TVA's Manager of Media Relations (Pet. App. A-5).

within the scope of their duties." Thus, this case fits squarely within the scope of immunity conferred in *Barr* v. *Matteo, supra,* 360 U.S. at 575:

> The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable.

Moreover, as the court of appeals held (Pet. App. A-21):

> The policies which favor the *Barr* rule are most appropriate in defamation actions of this type, where the [respondents] have a statutory directive to speak out on a matter of public concern, and where the [petitioners] * * * seek to enjoin or impose liability on them for their good faith evaluation and criticism of their product.[7]

Petitioners nevertheless suggest that TVA employees' statements about electrical devices are a "proprietary" rather than a "governmental" function (Pet. 8-9). The court of appeals noted, however, that the conduct in question here was "the exercise of certain wholly governmental functions" and was "expressly directed and authorized by a valid constitutional Act of Congress" (Pet. App. A-25). Such action is plainly governmental. See, *e.g., Federal Land Bank* v. *Board of County Comm'rs,* 368 U.S. 146, 150-151 (1961); *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 102 (1941); *Pittman* v. *Home Owners' Loan Corp.,* 308 U.S. 21, 32 (1939).[8]

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[7] *Barr* itself, of course, was a defamation action. The Court has recently reaffirmed that federal officials have "absolute immunity from suits at common law" (*Harlow* v. *Fitzgerald,* No. 80-945 (June 24, 1982), slip op. 7). See also *Butz* v. *Economou,* 438 U.S. 478, 488-489 (1978).

[8] Because TVA's employees are immune from suit, the claim that TVA is vicariously liable for their acts must also fall. See *Walters* v. *TVA,*

2. Contrary to petitioners' assertions (Pet. 6-8), the "sue-and-be sued" clause of the TVA Act, 16 U.S.C. 831c(b), does not affect or generate substantive liability. It merely removes the procedural bar to suit against a government instrumentality. The legislative history of the provision indicates its procedural nature ("so that all persons who had a cause of action against the corporation might have their day in court") (H.R. Rep. No. 130, 73d Cong., 1st Sess. 16 (1933)), and this principle has been followed consistently by the courts. See, *e.g.*, *Atchley* v. *TVA*, 69 F. Supp. 952 (N.D. Ala. 1947); *Grant* v. *TVA*, 49 F. Supp. 564, 565 (E.D. Tenn. 1942). In *Atchley*, the court held (69 F. Supp. at 954):

> A distinction must be recognized between the procedural question of whether a government corporation is subject to suit and the substantive question of whether a given set of facts establishes its liability as a matter of substantive law. The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to suit against an agency of the Federal Government. It does not engender liability in a case where liability would not otherwise exist. *Lynn* v. *United States*, 5 Cir., 1940, 110 F.2d 586; cf. *Posey* v. *Tennessee Valley Authority*, 5 Cir., 1937, 93 F.2d 726.

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supra; Stewart v. *Craig*, 208 Tenn. 212, 344 S.W.2d 761, 763 (1961). A common law claim for vicarious liability is governed by state law. *Wheeldin* v. *Wheeler*, 373 U.S. 647, 652 (1963); *Jackson* v. *TVA*, 413 F.Supp. 1050, 1055 (M.D. Tenn. 1976), aff'd, 595 F.2d 1120 (6th Cir. 1979). And in *Stewart* v. *Craig*, *supra*, the Tennessee Supreme Court held that vicarious liability of the principal is barred when the agent is not subject to liability.

In any event, as the court of appeals held (Pet. App. A-25), TVA is not subject to suit for an exercise of wholly governmental functions.

Since the TVA would not otherwise be liable to petitioners, their reference to the "sue-and-be-sued" clause adds nothing to their argument.[9]

3. The court of appeals correctly held that the district court did not abuse its discretion in denying petitioners' request for an injunction and a declaratory judgment. Finding a "public interest in energy conservation and energy saving devices" (Pet. App. A-9), the district court held (*id.* at A-8):

> The free discussion of matters of public interest is not properly enjoined. *Robinson v. American Broadcasting Cos.*, 441 F.2d 1396 (6th Cir. 1971); *American Broadcasting Cos. v. Smith Cabinet Mfg. Co.*, 160 Ind. App. 367, 312 N.E.2d 85 (1974); *Krebiozen Research Foundation v. Beacon Press, Inc.*, 344 Mass. 86, 134 N.E.2d 1 (1956).

The cases cited by the district court,[10] and numerous other cases, hold that the efficacy and quality of goods and

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[9]Petitioners are incorrect in asserting (Pet. 6) that TVA and its employees "enjoy a more favored position than the federal government itself because of the liability imposed on the federal government through the Federal Tort Claims Act." It is true that claims against the United States arising from TVA's activities are exempted from that Act (28 U.S.C. 2680(*l*)); but it is likewise the case that all claims against the United States based on libel and slander, such as petitioners allege here, are also exempted from that Act (28 U.S.C. 2680(h)). Thus, the bar to petitioners' claim does not turn on any purportedly "favored" position of TVA.

We also note that petitioners have claimed punitive damages (Pet. 2). Such a remedy does not lie against TVA (*e.g.*, *Painter* v. *TVA*, 476 F.2d 943 (5th Cir. 1973); *Grant* v. *TVA*, 44 F. Supp. 589 (E.D. Tenn. 1941)), and that portion of the complaint is subject to dismissal on this ground as well.

[10]The district court also noted this Court's statement in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), that " 'energy conservation * * * is an imperative national goal' " (Pet. App. A-7 to A-8).

services sold to the public are matters of public interest. See *National Nutritional Foods Ass'n* v. *Whelan*, 492 F. Supp. 374 (S.D. N.Y. 1980); *Lewis* v. *Reader's Digest Ass'n*, 366 F. Supp. 154, 156 (D. Mont. 1973); *Hoxsey Cancer Clinic* v. *Folsom*, 155 F. Supp. 376, 378 (D.D.C. 1957); *Steaks Unlimited, Inc.* v. *Deaner*, 468 F. Supp. 779 (W.D. Pa. 1979), aff'd, 623 F.2d 264 (3d Cir. 1980); *Trails West, Inc.* v. *Wolff*, 298 N.E.2d 52 (N.Y. 1973). Comments about petitioners' alleged energy saving device clearly fall within the ambit of these cases. Accordingly, petitioners' claims for equitable relief were properly denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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